IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 55 OF 2001

1. Mr. Babli Krishna Vaigankar,
   Major of age,
   Married, retired,
   And his wife,

2. Mrs. Shantabai Babli Vaigankar,
   Major of age,
   Married, housewife,
   Both residents of Carona,
   Aldona, Bardez, Goa. ... Appellants

versus

1. Mr. Laxman Sagun Vaigankar,
   Major of age,

2. Mrs. Sitabai Sitaram Vaigankar,
   Major of age,
   Widow of late
   Mr. Sitaram Vaigankar,
   Both residents of Carona,
   Aldona, Bardez, Goa. ... Respondents

Mr. S. D. Lotlikar, Senior Advocate with Ms. S. Naik, Advocate for the Appellants.

Mr. V. A. Lawande, Advocate for the Respondents.

CORAM : N. A. BRITTO, J.

DATE : 7TH APRIL, 2006.

JUDGMENT

This is defendants' second appeal filed under Section 100, C.P.C.

2. The parties to this appeal shall be referred to in the names as they appear in the cause title of the said Civil Suit.

3. Some facts are required to be stated to dispose off the substantial questions of law framed whilst admitting the appeal on 21-3-2002.

4. Laxman Vaingankar had a house built in the property of the family belonging to Mrs. Bertha Noronha e Souza surveyed under No.228/35. The said Laxman Vaingankar had two sons namely, Sagun Vaingankar and Krishna Vaingankar and consequently two divisions of the said house were made one having house no.228/35 which belonged to the said Sagun Vaigankar and 228/34 which belonged to Krishna Vaingankar. The said Sagun Vaingankar had three sons namely, Laxman (plaintiff no.1), Sitaram(deceased husband of plaintiff no.2) and Anant as a result of which the northern portion having house

no.228/35 has come to be enjoyed in three separate divisions though they have a common electricity meter. Both the divisions namely house no.228/35 now belonging to the plaintiffs and the said Anant had ingress and egress from the eastern side to go to the road situated on the western side via the southern side of the said divisions. The evidence produced by the plaintiffs and accepted by both the Courts below shows that the plaintiffs and the defendants had access to both the divisions only from the eastern side to come to the road on the western side via the southern side.

5. The defendants by Sale Deed dated 11-3-1988 purchased from the said Mrs. Bertha Noronha e Souza the southern division of the said house along with land admeasuring about 396 sq. metres, styled as plot B as shown on the plan annexed to the said Sale Deed and thereafter obtained a licence from the Village Panchayat dated 23-12-1988 and reconstructed the said southern portion/division at a distance of about a meter from the common wall and whilst doing so kept ingress and egress to the reconstructed house on the western side towards the said road. One of the conditions of the said licence

(Exh.PW2/A) was that the defendants were required to maintain the ancestral access to the neighbour.

6. The only dispute involved in this second appeal, is as regards the declaration sought by the plaintiffs in relation to the said access by way of an easement of necessity or by prescription.

7. It was the case of the plaintiffs that the only access to their house was from the eastern side which passed by the rear side of the defendants house leading to the east-west direction and meeting the said road which the plaintiffs had been using since the time of their ancestors and which was three meters in width, and as far as plaintiff no.1 is concerned, he was using the same for the last about 58 years, and as far as plaintiff no.2 is concerned, for the last 30 years from the time of her marriage and that the defendants on or about 8-5-1991 had extended a portion of their roof on the southern side and erected a wall and reduced the width of the said access to about 1 meter and by Order dated 22-9-1992 the learned trial Court was pleased by way of temporary injunction to restrain the defendants from

interfering with the use of the said access or obstructing the same by throwing dirt, etc. till the disposal of the Civil Suit.

8. The case of the defendants, as far as the suit access was concerned, was that the plaintiffs and the defendants had direct access to their houses from the main road and the plaintiffs did not have to pass by the side of the house of the defendants to come to their house and the plaintiffs house had a door opening to the side of the said main road.

9. The learned trial Court framed several issues. The first issue was whether the plaintiffs proved that they had been using the suit access since the time of their ancestors and the second issue was whether the plaintiffs proved that they were entitled to use the suit access as an easement of necessity or in the alternative by way of prescription. As far as the first issue is concerned, the learned trial Court answered the same in the affirmative and as far as issue no.2 is concerned answered the same in the negative. In answering the first issue, the learned trial Court concluded that there was no entrance/door to the house of the plaintiffs on the western side and the door which

was there to the portion occupied by the said Anant(being the northern most portion of house no.228/35), the plaintiff had no access to the same and, therefore, proceeded to decree the suit partly in terms of prayer (A) restraining the defendants from interfering with the use of the suit access by the plaintiffs in any manner either by way of blocking the same or causing nuisance by throwing filthy substance, etc. The learned trial Court also concluded that both the houses(or divisions) in its original condition always faced the west. The learned trial Court found that Section 13 of the Indian Easement Act, 1882(Act, for short) was inapplicable as there was no partition of joint property between the plaintiffs and the defendants as the property belonged to the landlady(Mrs. Bertha Noronha e Souza) and the plaintiffs and the defendants were only mundkars and, therefore, there was no severance of tenements as envisaged under Section 13 of the said Act and since the main road was situated just behind the house of the plaintiffs and already one portion was facing the road, the use of the way through the property of the defendants by the plaintiffs could not be termed as absolute necessity. As regards access by way of prescription, the learned trial Court concluded that mere long use would not give rise to

any prescription and such a right could also not be claimed by the plaintiffs against the defendants because the defendants had purchased the property only in the year 1988 which amounted to a period of less than 20 years.

10. The defendants having filed an appeal before the District Court, the learned Additional District Judge came to the conclusion that the plaint when read in its totality and by liberal construction of mofussil pleadings clearly showed that the plaintiffs had claimed access to the road from the west from the way passing to the house of the defendants and which was the only access for the plaintiffs to go to the main road on the west and which they had been using uninterruptedly, continuously and peacefully for 30 years and which they had acquired right by way of prescription and, therefore, the defendants could not be heard to say that there had been no pleadings either of user or right and having acquired the same by way of prescription. The learned Additional District Judge also held that the right which was available to the plaintiffs as against the landlady could also be available against the defendants on account of purchase of plot from the owners. The learned Additional District Judge

held that the plaintiffs had established that the access to the plaintiffs to reach the main road on the west was from the suit access and not on the western side, as was taken up in defence, and that each of the plaintiffs had established that they had registered as mundkars. The learned Additional District Judge held that the plaintiffs had been able to establish that the suit access was the only access and there was no other way to reach the road on the west and that the trial Court had erred in holding that the user of access was permissible and proceeded to modify the impugned Judgment in terms of O 41, R 33, C.P.C. and held that the suit of the plaintiffs deserved to be decreed holding that the plaintiffs were entitled to the suit access and for an order of permanent injunction to restrain the defendants from interfering in the use of the suit access. In substance whatever relief was granted by the learned trial Court has been upheld by the learned first appellate Court, may be for different reasons.

11. The first substantial question on which this second appeal was admitted is whether it is open to the appellate Court in exercise of its power under O 41, R 33, C.P.C. to reverse a

part of the Decree passed by the trial Court against a party who has neither preferred a cross appeal nor cross objection against that part of the Decree which rejected a part of the suit. In my view, this question does not at all arise as a substantial question of law, as is rightly pointed out on behalf of the plaintiffs. That apart, O 41, R 33, C.P.C. provides that the appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, and may, where there have been decrees in cross-suits or where two or three decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the appellate Court shall not make any order under Section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.

12. The Apex Court in the case of **Koksingh v. Deokabai** (AIR 1976 SC 634) has ruled that if an appellate Court is of the view that any decree which ought in law to have been passed was not passed by the Court it may pass or make such further or other decree or order as the justice of the case may require and that the appellate Court is competent to pass a decree for the enforcement of a charge in favour of the respondent notwithstanding the fact that the respondent did not file any appeal from the decree. I have already stated that the learned Additional District Judge has in substance not modified the decree but has only confirmed the relief granted by the trial Court by which the plaintiffs were held to be entitled to the suit access and consequently for permanent injunction to restrain the defendants from interfering with the said suit access. The first substantial question, therefore, does not arise and is answered accordingly.

13. The second substantial question is whether in view of the position admitted by the respondents in their claim, that they were residing in the suit plot through which they were claiming an access as mundkars, thereby admitting that their

occupation was permissive and in view of the further admitted position that the plaintiffs were not owners of any part of the suit plot, but were merely in occupation of the structure situated therein with the consent of the owner of the property, they could be held to acquire a right of way through the said plot either by way of prescription or by way of easement of necessity. This question also does not arise as substantial question. This question was not raised by the defendants before both the Courts below. The plaintiffs did not claim the said access as mundkars of the said family of Mrs. Bertha Noronha e Souza. They were claiming the said access as an easement of necessity to enjoy their house or division, and which they were enjoying at least for the last 58 years without which they would not be able to enjoy or occupy the said house/division.

14. There is no dispute that the family of the said Mrs. Bertha Noronha e Souza had granted a right to the said Laxman Vaingankar to build a house in their property and after the said house was built the said Sagun(through whom the plaintiffs claim) and the said Krishna(through whom the defendants claim) the said divisions/houses faced east and the

only means of ingress and egress to the said houses/division of the plaintiffs was from the eastern side then going towards the south in order to come to the road situated on the western side. As found by both the Courts below, the plaintiffs had no means of ingress or egress except to use the said door of their house situated on the eastern side to come to the road on the western side. An easement has been defined by Section 4 of the Indian Easements Act, 1882(Act, for short) as a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of certain other land not his own. As already stated, the landlord/bhatkars having granted a part of their land to the said Laxman Vaingankar, the said Laxman Vaingankar was entitled to use their land as an easement of necessity, easement of necessity being an easement without which the house could not be used at all. In other words, the plaintiffs could not have used the house unless they used the land of their bhatkars to come to the said road situated on the western side of their house. Easement of necessity is one which the law creates according to doctrine of implied grant in a particular case and is

one without which the dominant tenement cannot be used at all. The house constructed by the said Laxman Vaingankar into the property of the bhatkar had to be considered as dominant heritage and the land of the bhatkar as servient heritage. As stated below Section 4 of the Act, the land for the beneficial enjoyment of which the right exists is called the dominant heritage and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage and the owner or occupier thereof the servient owner. If the family of Sagun were using the ingress/egress from the eastern side of their house, through the property of the bhatkar to come to the main road lying on the western side they were doing so as an easement of necessity, and they had none other, and it is well settled law that an easement is a right or interest in immovable property and its benefits and burden passes through every person into whose occupation the dominant and servient tenement comes. If the plaintiffs were using the said access to come to the said road on the western side through the properties of the bhatkar, the said burden or liability would certainly pass on to the defendants after they had purchased a portion of that property from the said bhatkar/landlord. No

doubt the necessity as envisaged in Section 13 of the Act has got to be understood in ordinary sense and in the case at hand, it was absolute because the plaintiffs had no alternative means of access, much less an inconvenient one. Presumably what the defendants are contending is that since the said Anant has now opened a door to his portion on the western side to go on to the road situated on the western side and the defendants themselves have reconstructed their house facing the road, the plaintiffs should follow suit but this contention is ill founded. If the plaintiffs open a door on the western side of their house it is quite possible that the landlady could object to the same, notwithstanding the fact that plot A admeasuring 440 sq. meters in which the house/division of plaintiffs and the said Anant is situated has been offered to them to be sold. In my view, a pragmatic view is required to be taken and for the purpose of deciding a case of easement of necessity all that is sufficient is that a party claiming easement of necessity proves that for effective user of the house in the ordinary way and for its designed purpose the right of easement over a particular passage is essentially necessary. Necessity implies that it is not a rule of convenience. It does not appear to be a correct principle in law

that even if by effecting through remodelling of an existing structure, the structure remodelled can be used without the right of easement on the disputed property, a claim of easement of necessity will then stand defeated. A person will have an easement of necessity if he cannot go to the main road except using it. What the plaintiffs had claimed was also an easement of necessity in order to go from the only door to their house on the eastern side to go to the public road on the western side via the southern side of the house of the defendants and this, in my view, the plaintiffs were certainly entitled to as an easement of necessity as they had none other. The plaintiffs had not claimed the said access as mundkars nor had admitted that their occupation was permissible and, therefore, the question as framed also did not arise as a substantial question of law. The plaintiffs had claimed the said right of access as an easement of necessity to come out/in from their house and on to the main road on the western side as an easement of necessity to enable them to enjoy the said house.

15. Question 3 was whether the claim of the plaintiffs that their house was dominant heritage vis a vis the suit house which

was the servient heritage and whether the owner of the suit plot was necessary party to the suit whose non joinder was fatal? This question has got to be answered in the negative, for the owner of the suit plot had caused no interference in the right claimed by the plaintiffs inasmuch as the plaintiffs had claimed no relief against him. The last question is whether the notes of inspection made by the trial Judge at the time of consideration of the application for temporary injunction could be the basis of decreeing the suit in favour of the respondents? In fact, this question also does not arise at all. What the learned trial Court had observed was that the memorandum of site inspection becomes part of the record and while pronouncing Judgment it could be taken into consideration and in fact it has been taken into consideration by the learned trial Court but not to hold anything in favour of the plaintiffs but only to show that what the plaintiffs had stated that there was no space between the northern portion of his house and the compound wall, was incorrect. It has never been the basis of decreeing the suit and, therefore, this question does not arise at all.

16. In view of the above, I find that there is no merit in

this second appeal and consequently the same is hereby dismissed with costs by the defendants throughout.

N. A. BRITTO, J.

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